* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ Crl. AppealNo.386/2002

% Date of Decision : 20th of September, 2007

\# SHABBIR .....Appellant
! Through : Mr. Sumeet Verma, Adv.

versus

$
STATE .....Respondent
^ Through : Ms. Richa Kapoor, Adv.

* CORAM:
HON'BLE MR. JUSTICE R.S. SODHI
HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

: **B.N.CHATURVEDI, J.**

1. The appellant is in appeal against judgment dated 24th January, 2002 convicting him under Section 302 IPC and Section 27 of the Arms Act in Sessions Case No. 43/1997 arising out of FIR

No.23/1997 under Sections 394/398/302/212/120-B/34 IPC PS Lahori Gate, Delhi and sentencing him by order dated 29th January, 2002 to imprisonment for life and a fine of Rs.5000/- under Section 302 IPC, in default of payment of fine further RI for one year and RI for three years under Section 27 of Arms Act. The sentences on both the counts were directed to run concurrently.

2. The facts of the case, as unfolded by Ketan Kumar, an alleged eye witness, in his statement forming basis of FIR, are that when on 28th January, 1997 at about 1.45 pm Ketan Kumar, Jaswant Singh, Narottam (deceased) and Manu Bhai were present in their office located in premises No.301 Kucha Ghasi Ram, Chandni Chowk, Delhi, two persons aged about 25-30 years came in there to inquire about the location of House No.3 and 4. Jaswant Singh apparently taking exception to such enquiry

interjected to say that they could have better made the inquiry from some place outside. Meanwhile two more persons entered the office and one of them snapped the telephone connection by pulling the wire apart. On Ketan Kumar and others objecting to it, 2/3 out of the said four persons took out pistols. Ketan Kumar, Jaswant Singh Narottam and Manu Bhai got panicky. They started shouting. While Narottam, deceased was shouting facing street, one of the intruders fired at his face thereby killing him instantaneously. Ketan Kumar and Manu Bhai thereupon shouting 'CHOR CHOR' and holding dandas in their hands started chasing the said persons. On alarm being so raised members of the public also, armed with dandas, hockey sticks and iron rods, joined Ketan Kumar and Manu Bhai in their chase to apprehend the said persons on the run. Ketan Kumar and Manu Bhai, assisted by members of

public, eventually succeeded in overpowering the appellant. He was found carrying in his hand a country made pistol. He was the person who had shot dead Narottam. His associates, however, succeeded in making good their escape while firing in the air. The appellant was formally arrested. At his instance his co-accused were also arrested. One of his co-accused namely Mustkeem however, could not be arrested and he was declared as a proclaimed offender.

3. The appellant was charged under Sections 302/396/398 IPC as also under Section 27 of Arms Act while his co- accused Aas Mohammed was charged under Sections 396/398 IPC. Other co-accused namely Rakesh Kumar and Jagdish Prasad were charged under Section 396 IPC and another co-accused Subhash under Section 120 B read with Section 395 IPC. The appellant as well as his said co-

accused pleaded not guilty to the respective charges and were thus tried for the same.

4. The trial resulted in acquittal of all the four co-accused of the appellant as the learned Trial Court held that the charges of dacoity or attempt to commit the same were not proved. Even the appellant was held not guilty of charges under Section 396 or 398 IPC.

5. Sh. Sumit Verma, learned counsel for the appellant contended that from the statements of Jaswant Singh (PW-5), Ketan Bhai (PW-6) and Manu Bhai (PW-7) in their cross-examination it is evident that they had not witnessed the appellant actually firing at Narottam deceased and that the alleged recovery of the country-made pistol from his possession is rendered doubtful in view of inconsistencies in the statements of the said witnesses in regard to the manner of such recovery.

Besides, the learned counsel argued that according to the postmortem report the type of fire arm used was a Rifled one and as the prosecution has failed to establish that the country made pistol allegedly recovered from the appellant has a spiralling grooved barrel, the same could not be held to be the weapon of offence. The learned counsel further contended that according to the prosecution case the appellant had fired only one shot that killed Narottam and another shot was fired in the air by one of his co-accused in the process of their escape from the spot but recovery of two empty cartridge cases, one from the spot and the other from the barrel of the country made pistol allegedly recovered from the appellant totally demolishes the prosecution version in this regard.

6. Ms. Richa Kapoor, learned Addl. P.P. on the other hand defending the conviction and sentence

recorded against the appellant by the learned Trial Court sought to maintain that the account of incident as narrated by the three eye witnesses coupled with apprehension of the appellant soon after commission of the crime and recovery of the weapon of offence clearly proved beyond doubt the complicity of the appellant. According to her, the inconsistencies in the statements of the eye witnesses and the anomalies pointed out by learned counsel for the appellant are not good enough to dislodge the impugned conviction and sentence.

7. Out of a total of 25 witnesses examined by the prosecution to prove respective charges against the appellant, the testimonies of Jaswant Singh (PW-5), Ketan Kumar (PW-6) and Manu Bhai (PW-7) are pre-eminent as they are the persons who claim to have had witnessed the occurrence taking place. Further, Ketan Kumar (PW-6) and Manu Bhai (PW-7)

are the ones who are stated to have had apprehended the appellant after a hot pursuit and facilitated recovery of the weapon of offence from him.

8. The learned Trial Court based its finding of conviction against the appellant primarily on the statements of Jaswant Singh (PW-5), Ketan Bhai (PW-6) and Manu Bhai (PW-7) as also on recovery of the country made pistol (Ex.P1) from him on his apprehension by Ketan Bhai (PW-6) and Manu Bhai (PW-7) after a chase. On scanning the statements of the said three witnesses, who are claimed to have had witnessed Narottam deceased being shot at by the appellant, it is noticed that their statements are not free from inconsistencies which tend to create reasonable doubt if they had really seen the incident taking place. Jaswant Singh, (PW-5) though stated in his examination-in-chief that it was the person who was apprehended by Ketan Bhai (PW-6) and Manu

Bhai (PW-7) who had shot dead Narottam but in his cross-examination he affirmed that he had not seen the appellant actually firing at Narottam and that he had heard the gun shot only. He further stated that he could not say if the gun shot was fired by the appellant or some other person. Manu Bhai (PW-7) testified that at the relevant time when the appellant and his co-accused had come inside the office, he alongwith Ketan Bhai (PW-6) and Narottam deceased was present in the inner room of his office. In the outer room only Jaswant Singh (PW-5) was present. At one place in his cross-examination he affirmed that when the shot was fired he was near the door of outer room and Jaswant Singh (PW-5) as also Ketan Bhai (PW-6) were outside the office at a distance of 4/5 feet from the door of outer room. The site plan (Ex. PW 22/A) indicates the position of outer and inner rooms of the office, the covered varanda adjoining

the outer room and open varanda where Narottam deceased was shot dead at Point 'B'. The position of the said three witnesses as also of Narottam deceased at the time when the appellant and his co-accused had allegedly come in is shown at point 'A' which is inside the outer room. According to Manu Bhai (PW-7), thus, it would appear that at the relevant time when the shot was fired at Narottam deceased, Jaswant Singh (PW-5) and Ketan Bhai (PW-6) were present in the covered varanda adjoining outer room. Had Jaswant Singh (PW-5) been present in the adjoining covered varanda alongwith Ketan Bhai (PW-6), he would have clearly been in a position to see if the gun shot at Point 'B' in Ex. PW 22/A was fired at Narottam by the appellant or someone else. Jaswant Singh (PW-5) has however, as pointed out earlier, conceded in his cross examination that he had not seen the gun shot being actually fired at Narottam

rather he simply heard the gun shot and was thus not sure if it was the appellant or someone else who had fired at Narottam. Manu Bhai (PW-7) at another place in his cross-examination made a self contradictory statement where he stated that when he came out from inner room to outer room the shot had already been fired. He further stated that Ketan Bhai (PW-6) was ahead of him when he had come out of inner room to the outer room. Ketan Bhai (PW-6) in his statement admitted that from his seat in the inner room the main gate of the office was not visible. According to him when the gun shot was fired, Jaswant Singh (PW-5) was in the office and Manu Bhai (PW-7) was ahead of him (Ketan Bhai). He further stated that at the relevant time Narottam deceased was at a distance of only 5/6 feet from him which if accepted would mean that Manu Bhai (PW-7) was quite close to Point 'B' (Ex. PW 22/A) when

Narottam was fired at. Manu Bhai (PW-7) however does not support the statement of Ketan Bhai (PW-6) in this regard as according to him it were Jaswant Singh (PW-5) and Ketan Bhai (PW-6) who had actually been present in the covered varanda. The site plan (Ex. PW 22/A) shows the position of all the said three witnesses as also of Narottam deceased inside the outer room of the office at Point 'A' at the time when the appellant and his co-accused are said to have had entered the office. The site plan does not indicate the position of respective witnesses at the time Narottam was shot dead at Point 'B' in Ex. PW 22/A. In view of mutually contradictory statements of the said eye witnesses, as noticed hereinabove, a lurking doubt is caused in regard to the correctness of ocular account of the incident and consequently one cannot be sure if the fatal shot was fired at by the appellant alone and none else.

9. Apart from the statements of said three witnesses, apprehension of the appellant and recovery of the country made pistol (Ex. P1) besides two empty cartridge cases, a live cartridge and a lead core were also relied upon to connect the appellant with the commission of crime in question. Even though a large number of people were available at the spot, no person from public was however joined by the police as a witness of his apprehension by Ketan Bhai (PW-6) and Manu Bhai (PW-7) and recovery of country made pistol (Ex. P1) from him. As far as recovery of country made pistol (Ex. P1) from the appellant is concerned, again the statements of said three eye witnesses are at variance with each other. Jaswant Singh (PW-5) affirmed that the appellant had thrown away the country made pistol (Ex. P1) in the courtyard of his office building while trying to escape from the spot. Ketan Bhai (PW-6) on the other hand

told that the appellant was still holding the country made pistol (Ex. P1) in his hand when he was apprehended by him and Manu Bhai (PW-7). Manu Bhai (PW-7) on the other hand testified that the country made pistol (Ex. P1) was recovered by the police from the chowk alongwith a cartridge. Inspector Surinder Kumar, PW 8, who seized the country made pistol (Ex. P1) vide memo Ex. PW5/A stated that the same was at the relevant time being held by the appellant in his hand. If the recovery of country made pistol (Ex. P1) had really been effected from the appellant in the manner alleged by the prosecution there was no reason for the three eye witnesses to have made contradictory statements in regard to the place of such recovery.

10. Prosecution claim of recovering the country made pistol (Ex. P1) from the appellant immediately after the occurrence is difficult to accept not only

because the recovery thereof is rendered doubtful in view of contradictory statements of witnesses of recovery thereof but also on account of a circumstance as emanating from the CFSL report. According to the account of incident as testified by the three eye witnesses, the appellant had fired only one shot at Narottam, deceased and thereafter unsuccessfully tried to run away from the spot. Recovery from the scene of crime of an empty cartridge case could possibly be relatable to the gun shot which killed Narottam. In terms of CFSL report, apart from the said empty cartridge case recovered from the spot, a fired metallic jacket of 8 MM bullet had also been sent for forensic examination. If the prosecution version is to be believed the appellant would appear to have had fired twice from the country made pistol (Ex. P1) which is however not borne out from the testimony of the eye

witnesses. None of the eye witnesses states that after firing at Narottam, the appellant had fired from the country made pistol (Ex. P1) for the second time while running away from the spot before being apprehended. From the statement (Ex. PW 6/A) of Ketan Kumar, which formed basis of the FIR, it were co-accused of the appellant and not the appellant who had resorted to firing in the air while trying to escape from the spot. Thus, if the appellant had fired from the pistol (Ex. P1) only once, no explanation is forthcoming in regard to recovery of two empty cartridges including fired metallic jacket of a bullet which was found stuck into the barrel of the pistol (Ex. P1) at the time of its recovery from him.

11. Yet another circumstance running counter to the prosecution version is that the evidence on record falls far short of proving that the fatal shot had been fired by the appellant from the pistol (Ex. P1).

Postmortem report (Ex. PW 2/A) reveals that the type of fire arm used in the commission of crime was a rifled one. The country made pistol (Ex.P1) was not shown to Dr. K.L. Shrama, PW-2, who conducted postmortem examination on the dead body of Narottam, to secure his opinion if the gun shot injuries as mentioned in the postmortem report could have possibly been caused by the said country made pistol (Ex. P1). Even in the course of his examination before the court, the country made pistol (Ex.P1) was not produced before him to elicit his opinion in this regard. There is no evidence on record to prove that the barrel of country made pistol (Ex. P1) has spiralling grooves to make it a rifled type of fire arm. Learned counsel for the appellant stressed the need for showing the country made pistol (Ex. P1) to Dr. K.L. Sharma PW-2 to elicit his opinion if the gun shot injuries found on the dead

body of Narottam could have been caused by the country made pistol (Ex.P1), on the strength of a Supreme Court decision in **Ishwar Singh Vs. The State of Uttar Pradesh**; AIR 1976 SC 2428 wherein it was held :-

> "In Kartarey Vs. State of U.P. AIR 1976 SC 76 (at pg.80-81) this court emphasized the importance of eliciting the opinion of the medical witness who had examined the injuries of the victim.
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> > "It is the duty of the prosecution and no less of the court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes cause aberration in the course of justice."
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> In this case it is impossible to say with certainty whether the injury was caused by the ballam or the bhala that were seized, and, therefore, whether it was Ishwar Singh or Harpal who was responsible for it, even if one believed that on the day of the occurrence the former carried a ballam and the latter a bhala. Ishwar Singh's conviction

under Section 302 of the Indian Penal Code cannot also be sustained in these circumstances."

12. In the absence of any evidence that the country made pistol (Ex.P1) is a rifled one and that the gun shot injuries (Ex. PW 2/A) on the dead body of Narottam could have possibly been caused by that weapon, the learned Trial Court was not justified in brushing aside the argument by learned defence counsel that the gun shot injury could not have been caused from country made pistol (Ex.P1) simply on the ground that as per CFSL report the country made pistol (Ex. P1) could chamber a 8 MM cartridge. A reasonable doubt is thus cast in regard to correctness of accusation against the appellant of having shot dead Narottam with country made pistol (Ex. P 1).

13. In the face of infirmities and inconsistencies as noticed above, the finding of conviction against the appellant as recorded by the learned Trial Court cannot be

held to be well founded and on the strength of its evidence on record, the prosecution cannot claim to have succeeded in bringing home the guilt to the appellant beyond reasonable doubt. Consequently, the impugned conviction and sentence are liable to be set aside.

14. The appeal is, in the result, allowed and the judgment dated 24th January, 2002 of conviction of appellant under Section 302 IPC and Section 27 of Arms Act as also the order dated 29th January, 2002 sentencing him for the said offences are set aside and the appellant is acquitted of the charges according benefit of doubt. He being in jail custody is directed to be set at liberty forthwith if not required to be detained in connection with any other case.

(B.N. CHATURVEDI)
JUDGE

(R.S. SODHI)
JUDGE

September 20, 2007
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